STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals
Markey, P.J. and Wilder and Meter, J.J.

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

-vs- **Supreme Court No.** 126727

DAVID MICHAEL PERKINS,

Defendant-Appellant.
_____/

DEFENDANT-APPELLANT'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

Defendant-Appellant David Michael Perkins was convicted in the Wayne County Circuit Court on April 12, 2002. A Judgment of Sentence was entered on May 1, 2002. A Claim of Appeal was filed on August 23, 2002 by the trial court pursuant to the indigent defendant's request for the appointment of appellate counsel dated May 3, 2002. The Michigan Court of Appeals affirmed Defendant-Appellant's convictions in a published opinion on June 8, 2004. This Court granted Defendant-Appellant's application for leave to appeal in an order dated November 4, 2004.

STATEMENT OF QUESTIONS PRESENTED

I. **BECAUSE ITS NATURE DOES NOT TYPICALLY INVOLVE A SUBSTANTIAL RISK OF FORCEFUL TAKING, AND TO PRESERVE A DISTINCTION FROM ROBBERY, IS LARCENY FROM A PERSON A "SPECIFIED FELONY" FOR PURPOSES OF THE FELON IN POSSESSION OF A FIREARM STATUTE, MCL 224f(6)(i)?**

Court of Appeals answers, "Yes".
Defendant-Appellant answers, "No".

II. **IS LACK OF RESTORATION OF THE RIGHT TO POSSESS A FIREARM AN ELEMENT OF THE FELON IN POSSESSION OF A FIREARM OFFENSE, MCL 750.224F(2), DUE TO LEGISLATIVE INTENT, MAKING MCL 776.20, ADDRESSING BURDENS OF PROOF FOR ESTABLISHING EXCEPTIONS, INAPPLICABLE?**

Court of Appeals answers, "No".
Defendant-Appellant answers, "Yes".

STATEMENT OF FACTS

Defendant-Appellant, David Michael Perkins, was charged with felonious assault, MCL 750.82, felon in possession of a firearm, MCL 750.224f, and use of a firearm during the commission of a felony, MCL 750.227b. (14a). Following a bench trial on April 12, 2002 before Wayne County Circuit Judge Vera Massey Jones, Mr. Perkins was convicted of the latter two offenses. (8a). At his sentencing on May 1, 2002, Mr. Perkins was sentenced to two years in prison for the felony firearm conviction, consecutive to and preceding a two-and-one-half to seven-and-one-half-year term of imprisonment for the felon in possession of a firearm conviction.[1] (43a).

The charges stem from a party in which all participants were drinking and ultimately, arguing. Stanley Law told the trial court that on the day in question, he was living in a second floor apartment. Mr. Perkins, his nephew, Patrick Pope, and two women named "Amber" and "Claire" were "partying" at Mr. Law's apartment, an activity Mr. Law described as "getting drunk." (17a). Eventually, Mr. Law asked everyone to leave, so that he could get ready for a birthday party. (18a). Mr. Law pretended he was leaving also, but instead went around to the back of the building and climbed up to his balcony, re-entering his apartment. (19a). Mr. Law was in his kitchen when he noticed the nephew, Patrick Pope, had apparently also climbed up to the balcony and entered the apartment. Mr. Law confronted him, and threw him out the apartment's front door. (21a). A short time later, Mr. Perkins entered through the front door of the apartment and pointed a gun at Mr. Law, stating that he was going to kill him. (22a-23a). Mr. Law was drunk and, because of his state of inebriation, did not "panic." (23a). Instead, Mr. Law grabbed the gun from Mr. Perkins. When the gun was taken from Mr. Perkins it

discharged, leaving a hole in the apartment's ceiling. (24a). Defendant Perkins then left the apartment. One-half hour later the police arrived, though Mr. Law did not call them. (26a). He said that he injured his hand somehow, but did not need medical attention. Mr. Law told the trial court that on the day in question he had been drinking rum since getting up in the morning, and that usually, he drinks until passing out. (27a). Mr. Law characterized his confrontation with Mr. Perkins as "just arguing," adding that if he had not grabbed the gun, " . . . nothing probably would have happened." (33a).

Mr. Perkins confirmed in his testimony that he and the other persons were "partying" at Mr. Law's apartment, and believed that he drank a six pack of beer. (37a). After he left the apartment at Mr. Law's request, he remembered that he left his coat inside. (38a). Patrick Pope, the nephew, entered the apartment through the balcony to retrieve his uncle's coat, and encountered Mr. Law inside. After Mr. Law ejected Mr. Pope, Mr. Perkins entered through the front door and confronted Mr. Law for his behavior toward his nephew. According to Mr. Law, he took the handgun from his pocket and held it out to Mr. Law, telling him to take it and shoot him [Mr. Perkins]. (40a). When Mr. Law grabbed the gun, it discharged into the ceiling. (41a). On cross-examination, Mr. Perkins admitted having a 1977 conviction for larceny from a person. (41a).[2]

At the close of the proofs, Judge Jones acquitted Mr. Perkins of the felonious assault charge, but found him guilty of the two gun charges, stating:

> "You got two drunks so they can't establish any kind of intent, but it's real easy on this. Mr. Perkins is a convicted felon. He has no right to be in possession of a firearm. He admits he was in possession of the firearm, so he is guilty [sic] felon being in possession of a firearm and he's guilty of possession of a firearm in the commission of a felony." (8a).

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[1] Mr. Perkins was sentenced as a second felony offender, pursuant to MCL 769.10.
[2] A certified copy of the prior conviction was also admitted at trial. (35a).

Mr. Perkins appealed his convictions by right, and the Court of Appeals affirmed in a published opinion issued on June 8, 2004. (9a). Responding to Mr. Perkins' application for leave to appeal, this Court granted leave on the following questions:

(1) whether larceny from the person is a "specified felony" for the purpose of MCL 750.224f(6)(i); and

(2) whether under MCL 750.224f(2)(b) the lack of restoration of the right to possess a firearm is an element of the offense or an exemption or exception to which MCL 776.20 applies.

The Court also directed the parties to address, on the second issue, "the significance of the fact that the statute in issue in People v Pegenau, 447 Mich 278 (1994), involved a controlled substance violation, as to which MCL 333.7631 expressly places the burden of proving an exemption on the defendant." (13a).

ISSUE PRESERVATION/STANDARD OF REVIEW

The issues presented on appeal, involving statutory interpretation and the sufficiency of evidence, are preserved by raising them on direct appeal. People v Patterson, 428 Mich 502 (1987).

The de novo standard of review applies to the statutory construction of whether larceny from the person is a "specified felony" for MCL 750.224f(6)(i) purposes, and whether under MCL 750.224f(2)(b) the lack of restoration of the right to possess a firearm is an element of the offense or an exception to which MCL 776.20 applies. People v Bobek, 217 Mich App 524 (1996). Should this Court agree with Defendant-Appellant that larceny from a person is not a "specified felony" for felon in possession purposes, and proceed to analysis of the sufficiency of the evidence at trial, the de novo standard of review is appropriate. People v Wolfe, 440 Mich 508 (1992).

I. BECAUSE ITS NATURE DOES NOT TYPICALLY INVOLVE A SUBSTANTIAL RISK OF FORCEFUL TAKING, AND TO PRESERVE A DISTINCTION FROM ROBBERY, LARCENY FROM A PERSON IS NOT A "SPECIFIED FELONY" FOR PURPOSES OF THE FELON IN POSSESSION OF A FIREARM STATUTE, MCL 224F(6)(I).

In its creation of a statute proscribing the possession of firearms by convicted felons, the Michigan Legislature established a two-tiered scheme clearly intended to keep certain drug or violent felons from firearms possession longer than was the case with nonviolent felons. Persons with a prior nonviolent, or "non-specified" felony are permitted to possess firearms three years after the fines are paid, the prison term is served and probation or parole is completed. In contrast, persons with a prior drug-related, violent, or "specified" felony are permitted to possess firearms five years after the fines are paid, the prison term is served, and probation or parole is completed, and the right to possess a firearm is restored. While certain offenses are listed in the latter "specified" category, the Legislature included a "catch-all" clause for others. The scope of that "catch-all" clause is at issue in this case.

The Legislative Scheme.

The Michigan felon in possession of a firearm statute, MCL 750.224f, provides:

> (1) Except as provided in subsection (2), a person convicted of a felony shall not possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm in this state until the expiration of 3 years after all of the following circumstances exist:
>
> > (a) The person has paid all fines imposed for the violation.
> > (b) The person has served all terms of imprisonment imposed for the violation.

(c) The person has successfully completed all conditions of probation or parole imposed for the violation.

(2) A person convicted of a specified felony shall not possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm in this state until all of the following circumstances exist:

(a) The expiration of 5 years after all of the following circumstances exist:

(i) The person has paid all fines imposed for the violation.

(ii) The person has served all terms of imprisonment imposed for the violation.

(iii) The person has successfully completed all conditions of probation or parole imposed for the violation.

(b) The person's right to possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm has been restored pursuant to section 4 of Act No. 372 of the Public Acts of 1927, being section 28.424 of the Michigan Compiled Laws.

(3) A person who possesses, uses, transports, sells, purchases, carries, ships, receives, or distributes a firearm in violation of this section is guilty of a felony, punishable by imprisonment for not more than 5 years, or a fine of not more than $5,000.00, or both.

(4) This section does not apply to a conviction that has been expunged or set aside, or for which the person has been pardoned, unless the expunction, order, or pardon expressly provides that the person shall not possess a firearm.

(5) As used in this section, "felony" means a violation of a law of this state, or of another state, or of the United States that is punishable by imprisonment for 4 years or more, or an attempt to violate such a law.

(6) As used in subsection (2), "specified felony" means a felony in which 1 or more of the following circumstances exist:

(i) An element of that felony is the use, attempted use, or threatened use of physical force against the person or property of another, or that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(ii) An element of that felony is the unlawful manufacture, possession, importation, exportation, distribution, or dispensing of a controlled substance.
(iii) An element of that felony is the unlawful possession or distribution of a firearm.
(iv) An element of that felony is the unlawful use of an explosive.
(v) The felony is burglary of an occupied dwelling, or breaking and entering an occupied dwelling, or arson.

Focusing on the statutory elements of the offense, for Mr. Perkins to be guilty of this offense, he must have either:

(A) been convicted of a felony, and

three years had not expired since he:

(1) paid all fines associated with the felony conviction,

(2) served all terms of imprisonment for that felony conviction, and

(3) completed all conditions of probation or parole imposed for that conviction,

Or, in the alternative,

(B) been convicted of a "specified" felony, and

five years had not expired since he:

(1) paid all fines associated with the felony conviction,

(2) served all terms of imprisonment for that felony conviction,

(3) completed all conditions of probation or parole imposed for that conviction,

and

he lacked the right to possess the firearm, obtained through the restoration process of MCL 28.424.

The prior felony used to convict Mr. Perkins of felon in possession of a firearm was a 1977 conviction for larceny from a person, MCL 750.357, a ten-year felony for which he apparently served two years in prison. (42a). At the time of the instant offense in 2001, far more than three years had elapsed since completion of the terms associated with the 1977 conviction. Therefore, the only theory of prosecution left was under Option (B), alleging that Mr. Perkins' larceny from a person conviction was a "specified felony," and that he had failed to have his right to possess a firearm restored pursuant to MCL 28.424.

Larceny from a person is not included as a "specified felony" in MCL 750.224f(6) subsections (ii) through (v), all of which require the presence of a particular element in the offense. Nor does it qualify under the first clause of subsection (i), which requires force as an element of the offense. It must therefore qualify under the "catch-all" language of subsection (i), which provides:

> (i) An element of that felony is the use, attempted use, or threatened use of physical force against the person or property of another, **or that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense** (emphasis added).

The Legislature Intended to Include Only Violent and Forceful Felonies in MCL 750.224f(6)(i).

The objective of statutory interpretation is to give effect to the intent of the Legislature. When the language of a statute is clear, it must be enforced as written, as the Legislature is presumed to have intended the meaning plainly expressed. It is also presumed that every word has some meaning, so that courts must avoid any construction that would render any part of the statute surplusage or nugatory. People v Borchard-Ruhland, 460 Mich 278, 284-285 (1999). To discover legislative intent, provisions of a statute must be read in the context of the entire statute

to produce, if possible, a harmonious and consistent whole. Michigan ex rel Wayne Co Prosecutor v Bennis, 447 Mich 719, 732 (1994), aff'd Bennis v Michigan, 516 US 442; 116 SCt 994; 134 LEd2d 68 (1996). What governs is the fair and natural import of the statute's terms, in view of the subject matter of the law. People v Morey, 461 Mich 325, 330 (1999).

What is clear from the construction of MCL 750.224f(6) is that the Legislature intended to create separate, but like, categories of "specified felonies." Had it intended the "catch-all" clause of subsection (i) to be substantially different from the first clause of (i), the Legislature would have created a new subsection. From a contextual standpoint, it makes sense to assume that like offenses are reached within subsection (i). A common-sense interpretation of the second clause would include insertion of the word "forceful" as follows:

> (i) An element of that felony is the use, attempted use, or threatened use of physical force against the person or property of another, or that by its [forceful] nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

It must be assumed that some felonies exist that lack force as an element, but are of a naturally forceful nature, to avoid construing the clause as surplusage. A logical connection, and not mere conjecture, should exist between the offense and the substantial risk that force may be used. Logical examples of such an offense are aggravated stalking, MCL 750.411i, and alternative types of second and fourth-degree criminal sexual conduct, MCL 750.520c and 750.520e [use of a position of authority for sexual contact with a mentally incapacitated victim, for example]. A nexus exists between such offenses and the potential for the use of force that is missing, categorically, from the offense of larceny from a person.

That the Michigan Legislature intended such a nexus is apparent from the legislative analysis of the felon in possession bills, which were enacted in 1992. The summary of House

Bill 5432 prepared by the House Legislative Analysis Section indicates that it would amend the penal code:

> . . . to prohibit a convicted felon from having a firearm until the expiration of five years after all of the following conditions were fulfilled: payment of all fines imposed for the offense, completion of any term of imprisonment imposed for the offense, and successful completion of all conditions of probation or parole. In addition, **someone whose offense had involved violence or the threat of it**, or whose offense was a drug offense, would have to obtain permission from the state police in order to have a firearm . . . (emphasis added) (45a).

Categorically, Larceny from a Person is not a Forceful, or Violent, Offense.

Larceny from a person is defined by MCL 750.357, which states:

> Any person who shall commit the offense of larceny by stealing from the person of another shall be guilty of a felony, punishable by imprisonment in the state prison not more than 10 years.

Larceny consists of the actual, or constructive, taking of goods or property of another, without consent and with the intent to permanently deprive. People v Long, 93 Mich App 579 (1979); People v Lerma, 66 Mich App 566 (1976). Larceny from a person includes all the elements of larceny, plus the additional element that the larceny is accomplished from the person of another or in his immediate area of control or presence. People v Gadson, 348 Mich 307 (1957); People v Gould, 384 Mich 71 (1970); People v Chamblis, 395 Mich 408 (1975), overruled on other grds by People v Cornell, 466 Mich 335 (2002); People v Wallace, 173 Mich App 420 (1988).

Significantly, this Court has recently affirmed that it is the absence of force that distinguishes the offense of larceny from a person from the offense of unarmed robbery. An exhaustive review of the common law roots of these offenses appears in People v Randolph, 466 Mich 532 (2002), where the issue was whether Michigan uses a "transactional approach" to define unarmed robbery. A majority of the Court determined that the force used to accomplish the taking

underlying a charge of unarmed robbery must be contemporaneous with the taking; force used later to retain stolen property is not included. While there was disagreement in the Court on this conclusion, there was one salient point on which there was unanimity:

> The dissent acknowledges that larceny and robbery are distinct crimes. That the two crimes are distinct offenses indicates nothing more than that they have different elements: robbery is a larceny aggravated by the fact that the taking is from the person, or in his presence, accomplished with force or the threat of force. People v Wakeford, 418 Mich 95, 127-128 (1983) (opinion of Levin, J.). Randolph, 466 Mich at 544.

Describing the statutory offense of larceny from a person, one of "Gillespie's" authors explains:

> Both robbery and stealing from the person include the stealing and taking of property from the person, the former by force and violence and the latter by stealth; in both cases the taking is regarded by the law as a larceny of property. It does not change the nature of the offense that the person plundered was asleep, or in an attempt to commit the offense, that there was nothing to take in the pocket which the defendant attempted to pick (footnotes omitted). Michigan Law and Procedure, Sec. 99:11, p. 112 (West Group, 2001).

Reported cases of larceny from a person include several indicating that the nature of the offense is not necessarily forceful, and is sometimes stealthful. In People v Evans, unpublished Court of Appeals opinion (#130858, 14138, 6-16-94) (52a) the defendant took money from an unlocked trolley fare box. In People v Howard, 50 Mich 390 (1883), People v Jones, 46 Mich 441 (1881), and People v Long, 44 Mich 296 (1880), the defendants picked pockets. In Hall v People, 39 Mich 717 (1878), the victim was asleep.

While some instances of larceny from a person may present a risk that physical force may be used to accomplish the taking, a substantial risk is required by the felon in possession statute before an offense is included as one that is by its nature forceful. As there are numerous ways in

which the offense may be committed that present little risk, larceny from a person should be categorically excluded from MCL 750.224f(6)(i).

That risk is not elevated to the level of "substantial" by the fact that larceny from a person requires a taking from a person or the immediate presence or control of a person. The Court of Appeals panel in this case was persuaded that this personal contact was enough, "[b]ecause a person whose property is stolen from his presence may take steps to retain possession, and the offender may react violently." While the position has appeal on its surface, it must be remembered that the risk of victim reaction is possible in many offenses that are clearly not forceful in nature. An offender may be in the process of entering a parked car, for example, when its owner approaches; the larceny from a motor vehicle is not inherently forceful, and should not become forceful because a victim's approach draws a reaction. A shop owner may observe a shopper placing an expensive item into a bag, and speak up to her. The owner of a business may approach the accountant believed to be embezzling. The potential that a victim may react to an observed felony injects too much conjecture into the categorical analysis. The approach adopted by the Court of Appeals in this case too greatly expands the range of "specified felonies," since the potential of violence could exist in so many cases involving non-forceful felonies. There is no greater risk that physical force would be used against a victim of larceny from a person than from hundreds of other crimes.

Defendant-appellant is aware that a the "substantial risk" theory has been construed to include larceny from a person in other contexts, including whether it qualifies as a crime of violence for career offender status under the federal sentencing guidelines, U.S.S.G. Sec. 4B1.1(a). In United States v Payne, 163 F3d 371 (CA 6, 1998), the Sixth Circuit Court of Appeals applied the categorical approach mandated by Taylor v United States, 495 US 575; 100 SCt 2143; 19 LEd2d

607 (1990) and adopted the position it believed to be supported by the weight of authority. Although larceny from the person typically involves no threat of violence, the Court observed, "the risk of ensuing struggle is omnipresent." Similarly, larceny from the person has been construed as a "violent felony" for purposes of the Armed Career Criminal Act, 18 U.S.C Sec. 924(e), because of a discerned "risk that violence will erupt between the thief and the victim." United States v Howze, 343 F3d 919 (CA 7, 2004).

Significantly, both federal statutes employ language different from the Michigan statute. For federal sentencing guidelines purposes within U.S.S.G. Sec. 4B1.1(a), a "crime of violence" includes "burglary of a dwelling, arson, or extortion, [involving] use of explosives, or otherwise [involving] conduct that presents a serious potential risk of physical injury to another." The same language is used in the "violent felony" definition of 18 U.S.C. 924(e)(2)(B). As the federal statutes preceded in time adoption of the Michigan felon in possession in 1992, and the Michigan Legislature chose to define the risk as "substantial" rather than "serious," it must be assumed that there is a reason. It is reasonable to assume that a greater nexus was desired between the offense and the use of force or violence.

As larceny from a person is not a "specified felony" for felon in possession of a firearm purposes, Mr. Perkins' convictions for that and the felony firearm offense must fail due to insufficient evidence.

Constitutional principles of due process require that a verdict be supported by legally sufficient evidence for each element of the crime. US Const Amend XIV; Const 1963, art 1, Sec. 17; In re Winship, 397 US 358 (1970); Jackson v Virginia, 443 US 307 (1979). The existence of some evidence, no matter how minimal, no longer satisfies this requirement. There must be

evidence sufficient to support a conviction on all elements, beyond a reasonable doubt. People v Hampton, 407 Mich 354 (1979), cert den 449 US 885 (1980). In this case, if Mr. Perkins' prior larceny from a person conviction does not legally qualify as a "specified felony" under MCL 750.224f(6), the proofs are completely absent on an essential element of the offense defined at MCL 750.224f(2).

Because there is insufficient evidence that Mr. Perkins committed, or attempted to commit, a felony, his conviction for felony firearm must also be vacated. "[I]n order to convict the defendant of felony-firearm, the prosecution was legally required to prove two things: first that the defendant carried or possessed a firearm . . . ; second, that the firearm was carried or possessed during the course of a felony or attempted felony." Wayne Co. Prosecutor v Recorder's Court Judge, 406 Mich 374, 397-398 (1979); CJI2d 11.34. While juries are not held to rules of logic in arriving at verdicts, and may engage in compromise or leniency, thus reaching inconsistent verdicts, judges sitting as finders of fact and appellate courts do not normally enjoy this freedom. People v Vaughn, 409 Mich 463, 466 (1980); People v Burgess, 419 Mich 305, 310-311 (1984). For example, where a trial judge's findings at a bench trial were inconsistent with the evidence, which showed either that the charged offense occurred or no offense occurred, reversal of the convictions on cognate included offenses was required in People v Fairbanks, 165 Mich App 551 (1987).

II. LACK OF RESTORATION OF THE RIGHT TO POSSESS A FIREARM IS AN ELEMENT OF THE FELON IN POSSESSION OF A FIREARM OFFENSE, MCL 750.224F(2), DUE TO LEGISLATIVE INTENT; MCL 776.20, ADDRESSING BURDENS OF PROOF FOR ESTABLISHING EXCEPTIONS, IS INAPPLICABLE.

Like the legal question of whether larceny from a person qualifies as a "specified felony" for purposes of MCL 750.224f(6), the issue of whether restoration of the right to possess a firearm is a an element, or exception, to the statute is a legal question of statutory interpretation. Both are outcome-determinative questions of first impression in this Court. In this case, if restoration is an element of the offense Mr. Perkins' felon in possession conviction must fail: no proofs on restoration were admitted at his bench trial. If restoration is an exception, the question becomes whether MCL 776.20 creates on a defendant either a burden of coming forward with evidence of restoration, or of proving restoration, and whether that burden is constitutional.

The Legislature intended lack of restoration of the right to possess a firearm as an element of the felon in possession offense.

As a matter of statutory construction, this Court must read the restoration subsection of the felon in possession of a firearm statute in context, to produce a harmonious and consistent whole. Michigan ex rel Wayne Co Prosecutor v Bennis, 447 Mich 719, 732 (1994), aff'd Bennis v Michigan, 516 US 443; 116 SCt 994; 134 LEd2d 68 (1996). As with the scope of the "specified felony" definition, what governs is the fair and natural import of the statute's terms. People v Morey, 461 Mich 325, 330 (1999). For a number of reasons, a fair reading of the language at issue reveals that lack of restoration of the right to possess a firearm is an element of the felon in possession offense.

First, the paragraph of MCL 750.224f(2) defining the offense gives equal weight to subsections (a) and (b), stating that both must exist:

> (2) A person convicted of a specified felony shall not possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm in this state until all of the following circumstances exist:
>
> (a) The expiration of 5 years after all of the following circumstances exist:
>
> (i) The person has paid all fines imposed for the violation.
>
> (ii) The person has served all terms of imprisonment imposed for the violation.
>
> (iii) The person has successfully completed all conditions of probation or parole imposed for the violation.
>
> (b) The person's right to possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm has been restored pursuant to section 4 of Act No. 372 of the Public Acts of 1927, being section 28.424 of the Michigan Compiled Laws.

This is the language typically used to define an offense, outlining the core elements that must be established beyond a reasonable doubt by the prosecution. A "plain English" reading of the language reveals that it is not the mere possession of a firearm by a previously convicted felon that creates the offense: a time element and license element must also be proven. To make out the offense, the prosecution must prove beyond a reasonable doubt that:

(a) the defendant possessed a firearm;

(b) the possession occurred within 5 years of the defendant's discharge from the terms of a prior specified felony; and

(c) the defendant did not have the right to possess the firearm through the restoration process.

That the element of lack of restoration exists in the negative does not change the result. Numerous other offenses in the Michigan Penal Code require the prosecution to establish a negative element. The failure to nourish a child may be charged as child abuse, based on the theory of an omission causing serious physical harm to the child, under MCL 750.136b. People v Todd, 201 Mich App 216 (1993), modified 444 Mich 936 (1994). The failure to pay child support is an element of felony nonsupport under MCL 750.165, a strict liability offense. People v Adams, 262 Mich App 89 (2004). And, the offense of operating a vehicle without a license causing death, MCL 257.904(4) consists of driving while knowingly lacking a license. City of Troy v McMaster, 154 Mich App 564 (1986).

Furthermore, the lack of restoration element is even easier to prove than the negative elements of the above listed offenses. The restoration process of MCL 28.424 is pursued by a defendant in his county of residence. MCL 28.424(1). The prosecution need only turn to another state actor, the county concealed weapons licensing board, to conclusively determine whether the defendant has sought restoration.

That lack of restoration is another element of the offense is also demonstrated by the legislative history accompanying House Bills 5432 and 5400. The second analysis prepared by the House Legislative Analysis Section describes the content of House Bill 5432 as follows:

> House Bill 5432 would amend the Michigan Penal Code (MCL 750.222 et al) to restrict firearm ownership and sales by someone who had been convicted of a felony. For the purposes of the bill, a "felony" would be a violation of state or federal law punishable by imprisonment for four years or more, or an attempt to violate such a law. Generally, an ex-felon would be barred from having a firearm (whether a pistol or long gun) for three years after meeting all of the following conditions: payment of all fines, serving of all terms of imprisonment, and successful completion of all conditions of probation or parole. **However, for certain serious felonies (which the bill would call "specified felonies"), gun possession would be barred for five years after the conditions were met, and the ex-**

> **felon would in addition have to have his or her firearm rights restored by the local concealed weapons licensing board under House Bill 4300** (emphasis added). (47a).

Nothing in this analysis suggests that lack of restoration should by anything other than an element of this offense. No suggestion exists that restoration should be an exception to the offense definition, or that the burden of persuasion or proof should rest on the defendant. Legislative analysis is, of course, a valuable tool for determining legislative intent. Wilkins v Ann Arbor Clerk, 385 Mich 670 (1971).

That lack of restoration is an element has been accepted at face value by some courts. In People v Weems, unpublished opinion of the Michigan Court of Appeals (#247435, 9-23-04) (50a), for example, the trial court "concluded that in order to establish the offense of felon in possession of a firearm, the prosecution was required to show that defendant's right to carry a firearm had not been restored." That court "evaluated the sufficiency of the evidence and concluded, correctly or not, that the prosecution presented insufficient evidence to support the charge of felon in possession of a firearm because it did not establish that defendant's right to carry a firearm had not been restored." And, that trial court "additionally concluded that the prosecution could not 'satisfy element three, that less than five years has passed since all fines were paid, all imprisonment was served, all terms of probation were complete.'" The Weems panel did not reach the issue at bar, as it found that the trial court's decision operated as an acquittal for double jeopardy purposes, whether right or wrong.

Restoration of the right to possess firearms is not an exception to the felon in possession statute.

An "exception" has been described in Black's Law Dictionary as:

> Act of excepting or excluding from a number designated or from a description; that which is excepted or separated from others in a general rule or description; a person, thing, or case specified as distinct or not included; an act of exception, omitting from mention or leaving out of consideration; and 'except' means not including. Revised 4th edition (1968).

The Michigan Legislature's decision to include lack of restoration within the section defining the offense of felon in possession is persuasive evidence that an exception to the definition was not intended. Subsection (b) of MCL 750.224f(2) is an integral part of the offense's description; it is not "separated from others in a general rule or description." If the Legislature intended it not to be an element, it could easily have treated restoration as it did expungement. Expungement of the prior conviction appears as a clearly separate section (4) of the statute, providing that:

> (4) This section does not apply to a conviction that has been expunged or set aside, or for which the person has been pardoned, unless the expunction, order, or pardon expressly provides that the person shall not possess a firearm.

This is an exception of the type affected by MCL 776.20, which provides:

> In any prosecution for the violation of any acts of the state relative to use, licensing and possession of pistols or firearms, the burden of establishing any exception, excuse, proviso or exemption contained in any such act shall be upon the defendant but this does not shift the burden of proof for the violation.

Several such separate burden of proof provisions exist in the Michigan Penal Code, including the one construed in People v Pegenau, 447 Mich 278 (1994). There, the issue was the nature of the burden created by MCL 333.7531 as it relates to MCL 333.7403. The controlled substances act provides, at MCL 333.7401(1):

> (1) A person shall not knowingly or intentionally possess a controlled substance, a controlled substance analogue, or a prescription form **unless** the controlled substance analogue,

> or prescription form was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of the practitioner's professional practice, or except as otherwise authorized by this article (emphasis added).

MCL 333.7531 provides:

> (1) It is not necessary for this state to negate any exemption or exception in this article in a complaint, information, indictment, or other pleading or in a trial, hearing, or other proceeding under this article. The burden of proof of an exemption or exception is upon the person claiming it.
> (2) In the absence of proof that a person is the authorized holder of an appropriate license or order form issued under this article, the person is presumed not to be the holder of the license or order form. The burden of proof is upon the person to rebut the presumption.

This Court determined in Pegenau, as a threshold matter, that the language regarding a prescription in MCL 333.7403 "refers to an exemption rather than an element of the crime." 447 Mich at 292. The operative statutory words defining the crime's elements, the Court ruled, were simply the knowing and intentional possession of a controlled substance. The exception created by the Legislature for possession of a valid prescription is clearly identified as the "unless" clause in the statute. This statutory language stands in stark contrast to that of the felon in possession of a firearm statute. Unlike MCL 333.7403, MCL 750.224f(2) lacks the key word "unless," the hallmark of an exception. As it is an element of the felon in possession offense, rather than an exception, lack of restoration is unaffected by most of the Pegenau analysis or the burden of proof language of MCL 776.20. The Court of Appeals panel in this case cited Pegenau for its conclusion that restoration is an exception. However, the difference in the language and construction of the felon in possession and drug possession statutes show that such a conclusion is strained, at best.

The panel also relied upon People v Henderson, 391 Mich 612 (1974), a case from this Court interpreting the same firearms burden of proof statute, MCL 776.20. There, this Court determined that the "without a license" language of the carrying a concealed weapon statute qualified as an exception, on which the defense bears the burden of production under MCL 776.20. Significantly, it reached this conclusion providing very little analysis and acknowledging that it represented a departure from the earlier authority of People v Gould, 384 Mich 71 (1970). In Gould, the Court applied a line of authority finding that the offense had two elements; (1) the carrying of a concealed weapon, (2) at a time that the defendant lacked a license to carry it. In Henderson, the Court simply determined, "on reconsideration" of Gould, that the offense has but one element. The "without a license" language of MCL 750.227 "does not add an element to the crime, but simply acknowledges that a person may be authorized so to carry a pistol," the Court held, adding that "[t]his is the essence of a license." As it was no longer an element of the offense, the defendant bore that burden under MCL 776.20 of "injecting the issue of license by offering some proof - not necessarily by official record - that he has been so licensed." 391 Mich at 616.

The Henderson conclusion as to the "essence of a license" is unpersuasive and at odds with a logical and fair reading of the carrying a concealed weapon statute. The fact that the "without a license" language is embedded in the one paragraph defining the offense, and ease with which licensing is proven by the prosecution, suggest that the Legislature in fact intended lack of a license to be an element, rather than exception. This Court should adopt the more natural conclusion that the decision to include a negative element in the core definition of a crime was intended by the Legislature, and does not signal creation of an exception.

In the event that this Court determines that legislative intent is less than clear as to the felon in possession of a firearm statute, Mr. Perkins urges application of the rule of lenity. Where a statute is ambiguous, the rule of lenity requires that the ambiguity be resolved in favor of lenity and against the imposition of harsher punishment. People v Bergevin, 406 Mich 307 (1979). See also United States v Granderson, 511 US 39; 114 SCt 1259; 127 LEd2d 611 (1995); United States v Boucha, 236 F3d 768, 774 (CA6, 2001).

If restoration of licensing is an exception to the felon in possession statute, the defense burden is no more than of production, with the ultimate burden resting on the prosecution.

Should this Court find that restoration of the license to possess a firearm is not an element of the felon in possession offense, making the burden of proof provisions of MCL 776.20 applicable, the burden on the defense must be no more than to come forward with, or inject, evidence that the defendant obtained restoration. This burden is compelled by the language of MCL 776.20, the decision in Henderson, supra, and due process.

MCL 776.20 provides that the burden of establishing an exception "shall be upon the defendant but this does not shift the burden of proof for the violation." The panel in this case found that this burden can be no more than of production of evidence that the right to possess a firearm has been restored. Once the defendant presents evidence that his right to possess a firearm was restored, the prosecution bears the burden of proving that he or she has no license. The authority cited for this conclusion is People v Henderson, 391 Mich 612 (1974) and this Court's more recent decision in People v Pegenau, 447 Mich 278 (1994). Although the burden of proof provisions of MCL 776.20 and MCL 333.7531 are different, the Henderson and Pegenau

Courts held that the defendant bears the burden of production on the exception, with the prosecution bearing the burden of proving the lack of the exception beyond a reasonable doubt.

Due process principles compel this result. Patterson v New York, 432 US 197; 97 SCt 2319; 53 LEd2d 281 (1977), upon which the Pegenau Court relied, remains the lead authority on the limits which state legislatures face in defining crimes and the burden of proof. Only a true affirmative defense may operate to allocate the burden of persuasion to the accused, and such a defense would consist of facts which exonerate the defendant or reduce the degree of the offense and do not simply disprove an element of the crime. Pegenau, 447 Mich at 289. Restoration of the right to possess a firearm, like possession of a valid prescription or possession of a concealed weapons license, would fall into the category of an affirmative defense on which the prosecution retains the ultimate burden.

SUMMARY OF RELIEF AND REQUEST FOR ORAL ARGUMENT

For all of the reasons stated above, Defendant-Appellant David Michael Perkins asks this Honorable Court to reverse the Court of Appeals affirmation of his felon in possession of a firearm and felony firearm convictions, and vacate those convictions with prejudice.

Respectfully submitted,

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